Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1724

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JUDY CATES, Individually and Independent Executrix of the Estate of James Cates, Deceased,

Petitioner,

V.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

William Key Wilde
Counsel of Record

Mark E. Lowes
Of Counsel

2900 South Tower Pennzoil Pl.
Houston, Texas 77002
(713) 223-2900

Attorneys for Respondents, International Telephone and Telegraph Corporation, ITT Life Insurance Company, and Hartford Life Insurance Company

QUESTIONS PRESENTED

1. WHETHER THE PETITIONER'S DISMISSAL FOR FAILURE TO COMPLY WITH THE TRIAL COURT'S ORDER IS AN APPROPRIATE ISSUE FOR REVIEW BY THIS COURT WHEN THERE ARE NO UNIQUE ISSUES OF LAW OR PROCEDURE INVOLVED?

2. WHETHER IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DISMISS PETITIONER'S COMPLAINT FOR FAILURE TO COMPLY WITH THE TRIAL COURT'S ORDER?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES.	iii
STATEMENT OF THE CASE	3
A. First Appeal	3
B. Actions After Remand . . .	4
C. Motions for New Trial. . .	7
D. Final Trial Court Order. .	8
E. Second Appeal.	9
ARGUMENT.	9
I. Petitioner's failure to comply with the trial court's orders is not an appropriate issue for review by this Court.	9
A. Issue Raised by Petition .	9
B. Not Appropriate for Review	10
II. It was not an abuse of discretion to dismiss Petitioner's Complaint for failure to comply with the trial court's order.	12
A. Legal Standard.	12
B. Facts Supporting Dismissal	14
C. Defective Motions	15
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

CASES:	PAGE
Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964)	13
Browder v. Director, Dept. of Corrections, Ill., 434 U.S. 257, (1978). .	16
Cates v. Intl. Tel. and Tel. Corp., 756 F.2d 1161, (5th Cir. 1985)	4, 14
Conley v. Gibson, 355 U.S. 41, (1957).	11
Connolly v. Papachristid Shipping Ltd., 504 F.2d 917, (5th Cir. 1974).	12
Findley v. Rittenhouse, 416 F.2d 1186 (9th Cir. 1969).	13
Henderson v. Duncan, 779 F.2d 1421 (9th Cir. 1986)	13
Nat'l. Labor Relations Bd. v. Pittsburg S.S. Co., 340 U.S. 498, 503, (1951).	11
Nevijel v. North Coast Life Ins. Co., 651 F.2d 671 (9th Cir. 1981). . . .	12
Westbrook v. General Tire & Rubber Co., 754 F.2d 1233, (5th Cir. 1985). . .	15

RULES:

Sup. Ct. R. 17, 17.1. 10

Fed. R. Civ. P. 8(a), (e) 5, 6 13

Fed. R. Civ. P. 9, ... 5, 6

Fed. R. Civ. P. 12(e), (f). . . . 3, 4, 14

Fed. R. Civ. P. 41(a), (b). . . . 3, 12, 13

Fed. R. Civ. P. 59(e) 15, 16

Fed. R. Civ. P. 60, (b) 15, 16

NO. 87-1724

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

JUDY CATES, Individually and Independent Executrix of the Estate of James Cates, Deceased,

Petitioner,

V.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, International Telephone and Telegraph Corporation, ITT Life Insurance Company, and Hartford Life Insurance Company, respectfully request that this Court deny the petition for writ of certiorari, seeking to review the judgment of the United States Court of

Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 20, 1987.

STATEMENT OF THE CASE

This case has had a protracted history of delay due to Petitioner's failure to properly plead her claims or to comply with numerous trial court orders. This suit was filed in September 1979 and has been on appeal twice. The first appeal was from a dismissal for failure to state a personal cause of action. The first dismissal was preceded by four hearings, several orders, and two amended complaints. The second appeal, which gives rise to this petition, arises from a dismissal under Fed. R. Civ. P. 41(a) for failure to comply with the trial court's orders.

A. First Appeal

In the first appeal, the Court of Appeals described Petitioner's pleadings as extremely confused and unclear and stated that "[t]hey were doubtless subject to motions for more definite statements under Fed. R. Civ. P. 12(e) and perhaps to

motions to strike under Fed. R. Civ. P. 12(f). **Cates v. Intl. Tel. and Tel. Corp.**, 756 F.2d 1161, 1180 (5th Cir. 1985). The Court of Appeals remanded the case to the trial court to allow these and other pleading defects to be corrected.

B. Actions After Remand

Following the remand, the trial court conducted at least four hearings and issued four orders concerning the defects in Petitioner's complaint. Over a six month period, Petitioner was given two opportunities to amend. Despite these exhaustive efforts by the trial court, Petitioner ignored the trial court's orders. Additionally, in an attempt to get the trial court to reverse its dismissal, Petitioner willfully misrepresented the status of a state court case.

After remand, Petitioner agreed to replead in compliance with the Court of Appeals' opinion. However, the Third

Amended Complaint was a mere regurgitation of the defective Second Amended Complaint. The Third Amended Complaint also included new claims not allowed by the trial court and claims which the Court of Appeals had concluded could not be asserted by Petitioner.

On December 16, 1985, the trial court held a hearing on Petitioner's Third Amended Complaint. The court ruled on all pleading defects and denied leave to file the Third Amended Complaint. The court directed Petitioner to comply with Fed. R. Civ. P. 9 and 8, denied Petitioner's leave to add new claims or to add new parties, and directed the Petitioner to remove claims which were duplicative or mooted by the Court of Appeals' original opinion.

On February 7, 1986, in a six page Order, the trial court denied Petitioner's Motion to Reconsider its December 16, 1985 ruling and granted Respondents' Motion for

a More Definite Statement. (Petitioner's Appendix E, at pp. 1-9). Among the trial court's findings, it held that the Third Amended Complaint was defective because it failed to comply with Fed. R. Civ. P. 9, 8(a) and 8(e), and because it did not correct the defects of the Second Amended Complaint. Finally, the trial court found that the addition of new parties and new claims were not required by the Court of Appeals' opinion and that their addition would unduly prejudice the Respondents.

The trial court then gave Petitioner nine specific directives in order to replead in compliance with the Federal rules. (Petitioner's Appendix E, at pp. 3-9). The court gave Petitioner twenty days in which to amend in compliance with its Order. As was true throughout this case, Petitioner did not meet the deadline and made no effort to comply with the trial court's February Order.

On March 3, 1986, Petitioner filed a Motion for Leave to File a Fourth Amended Complaint which had the same defects as the prior complaints.

After a total of seven orders and eight hearings on the deficiencies of the complaints -- not counting the First Court of Appeals' opinion -- the trial court had finally had enough. At the hearing of April 11, 1986, the trial court issued its Order dismissing Petitioner's Complaint. (Petitioner's Appendix A, at p. 1).

C. Motions for New Trial

On April 21, 1986, Petitioner filed the first of five Motions entitled "Motions for New Trial." The first Motion asked the court to reconsider its dismissal because the Third and Fourth Amended Complaints were proper and because of proceedings in a state court action. Petitioner had taken no action in this state court case in six years. On two occasions, the Petitioner

expressly represented to the trial court that a Receiver had been appointed in state court. This was false.

D. Final Trial Court Order

On August 19 1986, the trial court issued its eighth and final order in this case. (Petitioner's Appendix B, at pp. 1-7). The trial court denied Petitioner's Motions to Reconsider. The trial Court concluded that: 1) the amended complaints were mere regurgitations of the Second Amended Complaint; 2) the specific requirements for repleading had not been adhered to; and 3) Petitioner had failed to amend her pleadings in compliance with the Court of Appeals' mandate. (Petitioner's Appendix B, at pp. 1-7). The trial court found that, contrary to Petitioner's express representations, no state court Receiver had been appointed.

E. Second Appeal

The Fifth Circuit affirmed the District Court's dismissal and denied Petitioner's petition for rehearing and rehearing en banc. (Petitioner's Appendix C, at pp. 1-2; Petitioner's Appendix D, at pp. 1-2). Petitioner now seeks writ of certiorari before this court.

ARGUMENT

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONER'S FAILURE TO COMPLY WITH THE TRIAL COURT'S ORDERS IS NOT AN APPROPRIATE ISSUE FOR REVIEW BY THIS COURT.

A. Issue Raised by Petition

The only question properly presented by the Petition is whether the trial court abused its discretion when it dismissed Petitioner's Complaint for failure to comply with its February 7, 1986 Order. As found by the trial court and affirmed by the Court of Appeals, Petitioner failed to

file an amended complaint in compliance with this Order. As a result the trial court dismissed the suit with prejudice. (Petitioner's Appendix A, at p. 1).

B. Not Appropriate for Review

Rule 17 of the Sup. Ct. R. states that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Sup. Ct. R. 17.1. Although the list of considerations in Sup. Ct. R. 17 is not exhaustive, Petitioner has failed to present any issues which come within the scope of this Rule.

Petitioner has not alleged that the second holding of the Fifth Circuit conflicts with a decision of another Court of Appeals on any matter. However, Petitioner has tried to convince this Court that there is conflict between the first

and second opinions of the Court of Appeals in this case. This is a "phantom issue."

After the first appeal by Petitioner, the Court of Appeals remanded the case to the trial court to correct pleading deficiencies. On the second appeal, the Court of Appeals' affirmed the trial court's dismissal for failure to comply with the trial court's subsequent orders.

In addition, there is no conflict with the opinion in **Conley v. Gibson**, 355 U.S. 41 (1957). (Petitioner's writ at pp. 28-29). Petitioner simply ignored proper orders of the trial court, and her complaint was dismissed.

Finally, this Court has held that it will not reverse a Court of Appeals if fair-minded judges could differ in opinion. **Nat'l. Labor Relations Bd. v. Pittsburg S.S. Co.**, 340 U.S. 498, 503 (1951). Review of this Complaint is not appropriate by this Court because it would be substituting

this Court's judgments in place of the Court of Appeals and the trial court on a matter of discretion.

II. IT WAS NOT AN ABUSE OF DISCRETION TO DISMISS PETITIONER'S COMPLAINT FOR FAILURE TO COMPLY WITH THE TRIAL COURT'S ORDER.

A. Legal Standard

Rule 41(b) to the Fed. R. Civ. P. authorizes the trial court to dismiss a complaint for failure to "comply with these rules or any order of the court . . . ." The Fifth Circuit has held that a dismissal pursuant to Rule 41(b) will be reviewed to determine if there was an abuse of discretion. It is not an abuse of discretion to dismiss a complaint where there has been a record of delay and contumacious conduct. **Connolly v. Papachristid Shipping Ltd.**, 504 F.2d 917, 920 (5th Cir. 1974).

There is ample authority to sustain a dismissal for failure to replead. In **Nevijel v. North Coast Life Ins. Co.**, 651

F.2d 671 (9th Cir. 1981), the court sustained a dismissal under Rule 41(b) on the grounds that the plaintiff failed to plead in compliance with Rule 8(a). Likewise, in **Henderson v. Duncan**, 779 F.2d 1421 (9th Cir. 1986), the court sustained a dismissal of a complaint on the grounds of inordinate delay, the existence of numerous warnings, and the prejudice to the trial court's management of its own docket. Finally, in **Agnew v. Moody**, 330 F.2d 868 (9th Cir. 1964) and **Findley v. Rittenhouse**, 416 F.2d 1186 (9th Cir. 1969), the court dismissed complaints where the plaintiff had been given opportunities to amend and failed to comply with those orders.

In this case there is a clear history of delay and willful disobedience of the trial court's orders by Petitioner. The trial court ordered Petitioner to correct deficiencies in Petitioner's Complaint which were pointed out by the Court of

Appeals. In addition to holding four different conferences with Petitioner and issuing four orders, the trial court listed nine specific defects that it found in the complaints. Petitioner's Fourth Amended Complaint failed to correct any of the deficiencies.

B. Facts Supporting Dismissal

In the first appeal, the Fifth Circuit variously described Petitioner's pleadings as ". . . extremely conclusory, confused, and unclear." **Cates v. Int'l. Tel. & Tel. Corp.**, 756 F.2d 1161, 1180 (5th Cir. 1985). The court went on to hold, that Petitioner's pleadings ". . . were doubtless subject to Motions for More Definite Statements under Fed. R. Civ. P. 12(e) and perhaps to Motions to Strike under Fed. R. Civ. P. 12(f). Id.

Following remand, the trial court conducted at least four hearings and issued at least four orders concerning the defects

in Petitioner's Complaint. Over the six month period, Petitioner was given two opportunities to amend.

Despite these exhaustive efforts by the trial court, Petitioner chose to ignore the trial court's orders. As a result of Petitioner's failure to comply with the trial court's orders, the trial court issued its Order dismissing Petitioner's Complaint. (Petitioner's Appendix A, at p. 1).

C. Defective Motions

On April 21, 1986 Petitioner filed the first of five alternate motions under Fed. R. Civ. P. 59(e) and 60(b). All of these motions were overruled on August 19, 1986. (Petitioner's Appendix B, at pp. 1-7).

A trial court's ruling on a Rule 59 or 60 Motion will not be disturbed absent an abuse of discretion. See, **Westbrook v. General Tire & Rubber Co.**, 754 F.2d 1233, 1241 (5th Cir. 1985). In addition, the

denial of a Rule 60(b) Motion does not allow the appellate court to consider the underlying order of dismissal. **Browder v. Director, Dept. of Corrections, Ill.**, 434 U.S. 257, 262, 263 (1978).

All of Petitioner's Motions filed after April 21st cannot be considered under Rule 59(e) as Motions for new trial. They were not timely filed, and if they raised any issues, those issues would have to be treated as motions pursuant to Fed. R. Civ. P. 60(b) for relief from judgment.

Only subpart 60(b)(2) of Fed. R. Civ. P. 60 applied to this case. It allows the trial court to set aside a judgment based on newly discovered evidence. In this case, Petitioner did not present any newly discovered evidence to the trial court. All Petitioner's activities after April 11, 1986 related to new actions that were taken in a pending state court action the state court did not render a final decision until

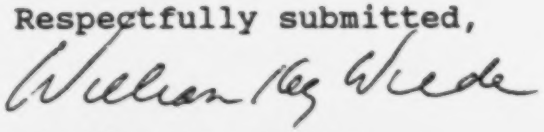
after this case was dismissed. Thus, there was no basis for the trial court to consider any of Petitioner's belated machinations in state court.

Petitioner's April 21, 1986 Motion, the second appeal to the Fifth Circuit, and this petition for writ of certiorari raise false issues. Petitioner claims that the April 11, 1986 Order was an improper ruling on Petitioner's standing to sue, and determination of whether Petitioner had failed to state a claim. In reality, the trial court dismissed because of Petitioner's failure to comply with the trial court's previous orders and the mandate of the Court of Appeals for the Fifth Circuit. (Petitioner's Appendix A, at p. 1).

CONCLUSION

For reasons stated, this petition for certiorari should be denied.

Respectfully submitted,



William Key Wilde
2900 South Tower Pennzoil Place
Houston, Texas 77002
(713) 223-2900

Attorney for Respondents, International Telephone and Telegraph Corporation, ITT Life Insurance Company, and Hartford Life Insurance Company

NO. 87-1724

JUDY CATES, Individually and Independent Executrix of the Estate of James Cates, Deceased,

Petitioner,

V.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, William Key Wilde, a member of the Bar of this Court, hereby certify that on this 16th day of May, 1988, three copies of the Respondents' Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Benton Musslewhite, 609 Fannin, Suite 517, Houston, Texas 77002, counsel for Petitioner herein. I further certify that all parties required to be served have been served.

William Key Wilde

William Key Wilde
2900 South Tower Pennzoil Place
Houston, Texas 77002
(713) 223-2900
Counsel for Respondents, International Telephone and Telegraph Corporation, ITT Life Insurance Company, and Hartford Insurance Company